



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 26, 2003

Mr. Jose R. Guerrero
Montalvo & Ramirez
900 North Main
McAllen, Texas 78501

OR2003-1216

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177011.

The South Texas Community College (the "college"), which you represent, received a request for the "**bid submittals from all bidders** and the results for RFP # 02-03-1018 . . .," and for "the evaluations and scores performed by the purchasing department of [the college] . . ." You state that the college takes no position as to whether any of the responsive information is excepted from disclosure, and that you have released some of the responsive information to the requestor. You also state that some of the remaining responsive information included in the responsive bid proposals may contain the proprietary information of two third parties, Precor, Incorporated and HEST Fitness Products. Accordingly, you state that some of the submitted information could be excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, you state that you have notified Precor, Incorporated and HEST Fitness Products of this request for information and of their right to submit arguments to this office explaining why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). We have considered the arguments made by HEST Fitness Products and have reviewed the submitted information.

Under section 552.305(d), an interested third party has 10 business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code

§ 552.305(d)(2)(B). As of the date of this letter, Precor, Incorporated has not submitted to this office reasons explaining why its bid proposal should not be released. Therefore, we have no basis to conclude that Precor's bid proposal is excepted from disclosure based on its proprietary interests. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We now turn to HEST Fitness Products' arguments against release. HEST Fitness Products argues, without more, that section 7.1 of its bid proposal is excepted from release as it "is not pertinent to the bid process, and contains private financial and corporate information." Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). HEST has provided no explanation as to why section 552.110(b) applies to the submitted information. Accordingly, we find that HEST has not established the applicability of section 552.110 to the requested information. *See* Gov't Code § 552.110(b); Open Records Decision Nos. 552 at 5 (1990) 542 at 3 (1990). Furthermore, we find that HEST Fitness Products has not established any other specific exceptions to release of any part of its bid proposal under the Act. *See* Gov't Code § 552.305(d)(2)(B).

We find, however, that some of the submitted information is made confidential by law, and so is excepted from required release under the Act.¹ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" to include "a taxpayer's identity." *See* 26 U.S.C. 6103(b)(2)(A). The term "taxpayer identity" "means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number

¹We note that the Office of the Attorney General will raise mandatory exceptions including sections 552.101 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(as described in section 6109), or a combination thereof.” *See* 26 U.S.C. 6103(b)(6). On this basis, we conclude that the submitted W-9 forms are made confidential pursuant to federal law in their entirety, and are therefore excepted from disclosure under section 552.101.

In summary, you must withhold the submitted W-9 forms in their entirety pursuant to section 552.101. You must release the remaining responsive information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 177011

Enc: Submitted documents

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